

PREGNANT PERSONS AS A GENDER CATEGORY: A TRANS FEMINIST ANALYSIS OF PREGNANCY DISCRIMINATION

Ding (din@arizona.edu)

1. THE PUZZLE: HOW IS PREGNANCY DISCRIMINATION BASED ON SEX?

Geduldig v. Aiello (1974): Discrimination on the basis of pregnancy is *not* discrimination on the basis of sex within the meaning of U.S. gender equality law, because pregnancy is distinctive of women as a gender category.

“The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—*pregnant women* and *nonpregnant persons*. While the first group is exclusively female, the second includes members of both sexes.” *Geduldig*, 417 U.S. at 497 n.20 (my emphasis).

“There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.” *Id.* at 496–97.

The prevailing feminist response: Discrimination on the basis of pregnancy counts as discrimination on the basis of sex *because* pregnancy is distinctive of women as a gender category.

“To deprive a woman . . . of disability pay because she is pregnant discriminates on the basis of sex because pregnancy has a *direct* relation to sex, and produces immediate disadvantages for employment for women only—and that is the end of the argument.” (Catharine MacKinnon, *Sexual Harassment of Working Women*, p. 123, her emphasis)

Analytical challenge for trans feminism: If pregnancy discrimination disadvantages not just pregnant women but pregnant persons of *all* genders, how can we vindicate the idea that pregnancy discrimination is on the basis of sex, within the legally relevant meaning of that phrase?

My view: Pregnancy discrimination is on the basis of sex not because pregnancy is distinctive of women as a gender category, but because pregnant persons constitute a gender category of their own.

In fact, on my reading, it is MacKinnon’s own radical feminist account of sex discrimination more broadly that commits her to the broad ideas behind this trans feminist analysis *avant la lettre*.

Frustratingly, MacKinnon’s explicit treatment of pregnancy discrimination never follows through on that commitment.

2. DISCRIMINATION AS UNEQUAL SOCIAL MEANING

Geduldig’s account (the “differences” or “difference” conception): Discrimination is *differential treatment* from similarly situated counterparts due to some underlying characteristic *itself*.

A statute, policy, practice, (in)action, norm, institution, or structure *P* discriminates against *F*s in a *P*-relevant context *C_p* on the basis of a characteristic *T* iff_{df} in *C_p*, *P* treats *F*s differently from similarly situated non-*F*s because of *T* itself.

MacKinnon’s alternative (the “inequality” or “dominance” conception): Discrimination is systematic disadvantage enabled by the social meaning of the relevant characteristic.

A statute, policy, practice, (in)action, norm, institution, or structure P discriminates against F s in a P -relevant context C_p on the basis of a characteristic T iff_{df} in C_p , F s are systematically (that is, nonaccidentally) disadvantaged because of the social meaning of T as reflected in P .

Contrasting the two conceptions: As late as 2023, the Charter Day School (CDS) in North Carolina still requires girls to wear skirts, because apparently to be a lady is to be, as the school’s founder explained in a deposition, “a fragile vessel that men are supposed to take care of and honor.”¹

While the requirement certainly treats the girls differently from the boys, the boys are treated just as differently from the girls.

The discrimination consists in the unequal social meaning embodied in that differential treatment, not the equally differential treatment as such.

As two of the girls then attending CDS stated to the district court below:

“The dress code and the constant monitoring by teachers and school administrators made me feel like they thought girls should not play roughly, or be as active and able to move around as freely and comfortably as boys—that we simply weren’t worth as much as boys.”²

“Girls having to wear skirts and dresses sends the message that girls should be less active than boys and that they are more delicate than boys. This translates into boys being put in a position of power over girls.”³

Here’s a useful way to draw out the contrast:

<i>Legally relevant meaning of ...</i>	<i>Differences conception</i>	<i>Inequality conception</i>
‘Discrimination’	Formalistic meaning (i.e., differential treatment)	Substantive meaning (i.e., systematic disadvantage)
‘Sex’	Biological meaning (i.e., sex as difference)	Social meaning (i.e., gender)

Sex discrimination, so clarified, has nothing to do with any alleged sex differences themselves, yet everything to do with the oppressive social structures and forces that nurture differences, turn them into substantive disadvantages, and then purport to be justified by the meaning of those differences in the first place.

3. APPLYING THE INEQUALITY CONCEPTION TO PREGNANCY DISCRIMINATION

One would expect, then, that pregnancy in the sense suitable for an inequality analysis of pregnancy discrimination should likewise be a *gender* status and position at the social rather than biological level.

Even when it is a woman who is discriminated against on the basis of her pregnancy, the systematic disadvantages she faces consist not in the mere biological fact that she happens to be pregnant, but in its unequal social meaning—which MacKinnon would theorize as womanhood.

1. Quoted in *Peltier v. Charter Day School (Peltier II)*, 37 F.4th 104, 113 (4th Cir. 2022) (en banc), *petition for cert. filed*, No. 22-238 (U.S. Sept. 12, 2022). The plaintiffs challenged the dress code only as applied to cisgender girls.

2. Declaration of K.B. ¶ 19, *Peltier v. Charter Day School (Peltier I)*, 384 F. Supp. 3d 579 (E.D.N.C. 2019) (No. 16-cv-30), https://www.aclu.org/sites/default/files/field_document/2017.11.29_ecf_152-8_kb_declaration.pdf.

3. Declaration of I.B. ¶ 16, *Peltier I*, 384 F. Supp. 3d 579 (No. 16-cv-30), https://www.aclu.org/sites/default/files/field_document/2017.11.29_ecf_152-7_ib_declaration.pdf.

In employment, for example, an inequality analysis should locate pregnancy discrimination not in the biological fact of pregnancy, but in “the *meaning given* that biology” (MacKinnon, p. 121, her emphasis), *inter alia*,

- a) “by the model of the job” (p. 121), which privileges the ability to work uninterrupted by health needs and childbearing work (which, socially, is hardly work at all);
- b) by “the disability plan, which covers women’s health needs only up to the cost of covering men’s” (p. 121); and
- c) by “the structure of the job market, which accommodates the physical needs, life cycle, and family expectations of men but not of women” (p. 118).

Another example (from Amy Reed-Sandoval, *Socially Undocumented*): Pregnant migrants of color who are *legally* authorized to enter the U.S. are still subject to systematic disadvantages because their visible pregnancy is interpreted *socially* as proof that they are undocumented and thus “illegal” after all.

The discrimination here needs to be explained in terms of the social meaning of pregnancy as a presumption of illegality, not the underlying reproductive biology as such.

And yet, MacKinnon assumes that women as a gender category are systematically disadvantaged by the social meaning of pregnancy *because* women and only women become pregnant.

“Confronted with what looks to be a real difference between the sexes, [the differences] approach implicitly attributes it to biology. In this way, substantive judgments are made about which differences between the sexes are ‘real’ or ‘relevant’ (in terms of permissible differential consequences) without explicitly investigating which real differences and consequences may result *from sexism itself*.” (p. 120, my emphasis)

Except to find the social disadvantages of pregnancy discrimination in purportedly women’s reproductive biology *is* precisely to acquiesce in the pernicious myth that biology, not “sexism itself,” is what explains sex discrimination.

4. PREGNANT PERSONS REDUX

What *Geduldig* gets wrong, I think, is not just its conception of discrimination as differential treatment, joined by a cissexist conception of pregnancy of distinctively women’s. Rather, there is another implicit assumption:

The binary conception of sex/gender: To discriminate on the basis of *sex* just is to discriminate on the basis of either *being a man* or *being a woman*.

Even on MacKinnon’s account, pregnancy discrimination is based on sex only because pregnancy’s social meaning systematically disadvantages *pregnant persons qua women*.

This way, womanhood becomes the interpreter necessary for translating a claim about pregnancy discrimination into a claim about sex discrimination.

But why do we have to think there is any gap between pregnancy discrimination and sex discrimination waiting to be bridged by womanhood in the first place?

My proposal: Pregnancy discrimination is based on sex because it bears on the social meaning of sex *directly* and *immediately*, not by way of womanhood.

Haslanger's insight: Gender categories can serve as a powerful analytical tool for capturing and theorizing gender as the social meaning of sex.

The category of women: S is a woman iff_{df} S is systematically subordinated along some dimension (economic, political, legal, social, etc.), and S is "marked" as a target for this treatment by observed or imagined bodily features presumed to be evidence of a female's biological role in reproduction.

For our purposes, I offer the following modified version of Haslanger's account designed to sidestep important counterexamples:

Gender categories: A category is gendered (for critical feminist analytical purposes) if its members are socially positioned as subordinate or privileged along some dimension (economic, political, legal, social, etc.), and the category is "marked" as a target for this treatment by observed or imagined, or would-be-observed or would-be-imagined, bodily features presumed (taken, suspected, expected, etc.) to be evidence of a certain (present, previous, or future) body socially interpreted as sexed one way or another.

On this account, the category of persons systematically disadvantaged because of the social meaning of their bodies being interpreted as pregnant comes out straightforwardly as a gender category—let's say, *pregnant persons*:

The category of pregnant persons: S is a pregnant person (for critical feminist analytical purposes) iff_{df} S is systematically subordinated along some dimension (economic, political, legal, social, etc.), and S is "marked" as a target for this treatment by observed or imagined, or would-be-observed or would-be-imagined, bodily features presumed (taken, suspected, expected, etc.) to be evidence of a (presently, previously, or future) body socially interpreted as pregnant.

Whether this might conflict with our pretheoretical intuitions or simply seem "too weird to say" is precisely beside the point; continuous with our assessment of scientific theories, intuitions about what's plausible would, *ceteris paribus*, do well to accommodate explanatory power, not the other way around.

Haslanger again:

"I offer this analysis as a way of capturing the standard slogan: gender is the social meaning of sex. Note, however, that in imagining 'alternative' genders we should be careful not to take for granted that the relevant biological divisions will correspond to what *we* consider 'sex.' (Alternative groupings could include: 'pregnant persons,' 'lactating persons,' 'menstruating persons,' 'infertile persons,' (perhaps 'homosexuals,' depending on the story given about physical causes)). Neither should we assume that membership in a gender will constitute one's personal or psychological identity to any significant degree." ("Gender and Race," p. 50, my emphasis)

So, pregnancy can be gendered even if it is not gendered *woman* or even sexed *female*.

When a pregnant person is discriminated against because of pregnancy—properly understood, a social rather than biological status—they are discriminated against *as a pregnant person*—that is, directly and immediately, a case of sex discrimination.

Since the category of pregnant persons is itself gendered, to disentangle pregnancy from womanhood is *not* to ungender pregnancy (*pace* Barnes, MacKinnon, Ginsburg).

The category *pregnant persons*, on my account, appropriately includes many who are not, and perhaps may not be capable of becoming, pregnant (*pace* "No Uterus, No Opinion").

The account does not run into Jenkins-style worries about wrongful exclusion/marginalization/inclusion (genders vs. gender categories).